

ORIGINAL

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FILED IN THE
UNITED STATES DISTRICT COURT
DISTRICT OF HAWAII

ARTHUR E. ROSS, #1005
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MAR 02 2006
at 3 o'clock and 37 min. *plw*
SUE BEITIA, CLERK

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Attorneys for Plaintiff
OFELIA COLOYAN

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

OFELIA COLOYAN

Plaintiff,

vs.

WILLIAM BADUA, JEFFERY
OMAI; SPENCER ANDERSON;
NEIL PANG; and DOES 5-10

Defendants.

CIVIL NO. 03-00476-KSC

NOTICE OF FILING PLAINTIFF'S
PROPOSED JURY
INSTRUCTIONS; CERTIFICATE
OF SERVICE

Trial is set for March 14, 2006.

NOTICE OF FILING PLAINTIFF'S PROPOSED JURY
INSTRUCTIONS


Ofelia Coloyan Plaintiff above-named by and through his attorneys Jack

Schweigert, Esq., Arthur E. Ross, Esq., and Rory Soares Toomey, Esq. submits her proposed jury instructions which have not been agreed to by the parties.

The Plaintiff reserves her right to withdraw any proposed instruction, to add new instructions, and/or to amend any proposed instruction. By submitting these proposed instructions, the Plaintiff does not admit or concede that any particular issue is, or may be properly submitted to the jury, nor does the Plaintiff does not admit or concede that any particular issue is a jury issue as opposed to a matter to be decided by the Court.

Nothing in these instructions constitutes consent by the Plaintiff to try any issue raised in the pleadings.

DATED: Honolulu, Hawaii, March 1, 2006



JACK SCHWEIGERT
ARTHUR E. ROSS
RORY SOARES TOOMEY
Attorneys for Plaintiff
OFELIA COLOYAN

Plaintiff's Proposed Jury Instruction 1

On the Plaintiff's claim against the Defendants for the Defendants' violation of her Fourth Amendment rights for entering and searching her home, the Plaintiff has the burden of proving each of the following elements by a preponderance of the evidence:

1. The acts or omissions of the Defendants were intentional;
2. The Defendants acted under the color of state law; and
3. The acts or omissions of the Defendants were the legal cause of the deprivation of the Plaintiff's rights protected by the Constitution and/or laws of the United States.

If you find that each of the elements on which the Plaintiff has the burden of proof has been proved, your verdict should be for the Plaintiff. If, on the other hand, the Plaintiff has failed to prove any of these elements, your verdict should be for the Defendants.

CITE: Section 11.1 Ninth Circuit Manual of Modern Jury Instruction (2001)
(modified)

_____ Given as Requested

_____ Given as Modified

_____ Refused

_____ Withdrawn

Over objection of:

_____ Plaintiff

_____ Defendants

Plaintiff's Proposed Jury Instruction 2

When a party has the burden of proof on any claim or affirmative defense by a preponderance of the evidence, it means you must be persuaded by the evidence that the claim or affirmative defense is more probably true than not true.

You should base your decision on all of the evidence, regardless of which party presented it.

CITE: Section.1.3 and 5.1 Ninth Circuit Manual of Modern Jury Instruction
(2001) (modified)

_____ Given as Requested
_____ Given as Modified
_____ Refused
_____ Withdrawn

Over objection of:
_____ Plaintiff
_____ Defendants

Plaintiff's Proposed Jury Instruction 3

This action was brought by a private citizen against persons who are employed as police officer by the City and County of Honolulu, State of Hawaii. This case should be considered and decided by you as an action between persons of equal standing in the community, equal worth, and holding the same or similar station in life. All persons stand equal before the law, and are to be dealt with as equals in a court of justice.

Schwartz **Section 1983 Litigation** Section 3.03 as modified as adapted from Kerr v. Chicago, 425 F. 2d 1134 (7th Cir.) Cert. denied 400 U. S. 833 (1970)

_____ Given as Requested
_____ Given as Modified
_____ Refused
_____ Withdrawn

Over objection of:
_____ Plaintiff
_____ Defendants

Plaintiff's Proposed Jury Instruction 4

An act is a cause of an injury or damage if it played any part, no matter how small, in bringing about the injury or damage. Therefore, even if the act operated in combination with some other cause, the act is a cause of the injury or damage if it played any part, no matter how small, in bringing about the injury or damage.

CITE: Section.1.3 and 5.1 Ninth Circuit Manual of Modern Jury Instruction
(2001) (modified)

____ Given as Requested
____ Given as Modified
____ Refused
____ Withdrawn

Over objection of:
____ Plaintiff
____ Defendants

Plaintiff's Proposed Jury Instruction 5

In order to be acting under color of state law the acts must be performed while the official is acting, purporting, or pretending to act in the performance of her official duty.

CITE: McDade v. West, 223 F. 3d 1135 (9th Cir. 2000), Section 11.2 Ninth Circuit Manual of Modern Jury Instruction (2001) (modified) and Defendant Nancy Murphy's Trial Brief, filed October 7, 2003, page 6.

_____ Given as Requested
_____ Given as Modified
_____ Refused
_____ Withdrawn

Over objection of:
_____ Plaintiff
_____ Defendants

Plaintiff's Proposed Jury Instruction 6

The Plaintiff claims that the Defendants intentionally deprived the Plaintiff of the Fourth Amendment constitutional right to be free from an unreasonable search.

The Plaintiff has the burden of proving by a preponderance of the evidence that the Defendants' search of her home was unreasonable.

CITE: Section 115 Ninth Circuit Manual of Modern Jury Instruction (2001)

(modified)

_____ Given as Requested
_____ Given as Modified
_____ Refused
_____ Withdrawn

Over objection of:

_____ Plaintiff
_____ Defendants

Plaintiff's Proposed Jury Instruction No. 7

In order for a search pursuant to an arrest warrant to be reasonable, the police officer must have both reason to believe that the suspect resides at the premises to be searched and that he is in the place to be searched at the time.

CITE: Perez v. Simmons, 884 F. 2d 1136 (9th Cir. 1989).

____ Given as Requested
____ Given as Modified
____ Refused
____ Withdrawn

Over objection of:
____ Plaintiff
____ Defendants

Plaintiff's Proposed Jury Instruction No. 8

If a police officer has a reasonable belief that the suspect resides in the premises to be searched but does not have a reasonable belief that the suspect is in the premises, or vice versa, the search is unlawful.

CITE: Perez v. Simmons, 884 F. 2d 1136 (9th Cir. 1989).

_____ Given as Requested
_____ Given as Modified
_____ Refused
_____ Withdrawn

Over objection of:
_____ Plaintiff
_____ Defendants

Plaintiff's Proposed Jury Instruction No. 8

A police officer, who conducts a search of the home of a third party based solely upon an arrest warrant, must have probable cause to believe both that the suspect resides in the home and he is there at the time the arrest is to be made.

CITE: United States v. Gorman, 314 F. 3d 1105, 1110-1115 (9th Cir. 2002).

____ Given as Requested
____ Given as Modified
____ Refused
____ Withdrawn

Over objection of:

____ Plaintiff
____ Defendants

Plaintiff's Proposed Jury Instruction No. 9

Therefore, a police officer may lawfully conduct a search of a third party's home for the subject of an arrest warrant only if the officers' knowledge has trustworthy information that would cause a person of reasonable caution to believe that the suspect is in (that) particular building, and at the same time that the search is conducted.

CITE: United States v. Gorman, 314 F. 3d 1105, 1113 (9th Cir. 2002).
citing Vasquez v. Snow 616 F. 2d 217, 220 (5th Cir. 1980)
quoting United States v. Phillips, 497 F. 2d 1131, 1136 (9th Cir. 1974).

____ Given as Requested
____ Given as Modified
____ Refused
____ Withdrawn

Over objection of:
____ Plaintiff
____ Defendants

Plaintiff's Proposed Jury Instruction No. 9

A search is reasonable, and a warrant is not required, if a person in lawful possession of the area knowingly and voluntarily consents to the search.

CITE: Section 117 Ninth Circuit Manual of Modern Jury Instruction (2001)

(modified)

_____ Given as Requested
_____ Given as Modified
_____ Refused
_____ Withdrawn

Over objection of:

_____ Plaintiff
_____ Defendants

Plaintiff's Proposed Jury Instruction No. 10

Mere acquiescence to lawful authority is insufficient to constitute consent to a search.

CITE: United States v. Spires, 3 F. 3d 11234, 1237 (9th Cir. 1993).

_____ Given as Requested
_____ Given as Modified
_____ Refused
_____ Withdrawn

Over objection of:
_____ Plaintiff
_____ Defendants

Plaintiff's Proposed Jury Instruction No.11

If you find for the plaintiff on any of Plaintiff's Fourth Amendment claim, you must determine Plaintiff's damages. Plaintiff has the burden of proving damages by a preponderance of the evidence which will reasonably and fairly compensate the plaintiff for the deprivation of civil rights legally caused by the defendant.

In determining the amount of his damages, if any, you shall take into consideration the money that the plaintiff had to expend in medical treatment, prescription drugs, along with the loss of income that she suffered as a legal cause of the Defendants acts, as well as the amounts of money to compensate him for the outrage, mental suffering, shame, humiliation, and ridicule that he suffered.

Your award must be based upon evidence and not upon speculation guesswork or conjecture.

CITE: Section 11.1 9th Circuit Manual of Modern Jury Instruction (2001)
(modified)

____ Given as Requested
____ Given as Modified
____ Refused
- ____ Withdrawn

Over objection of:
____ Plaintiff
____ Defendants

Plaintiff's Proposed Jury Instruction No. 12

The law that applies to this case authorizes an award of nominal damages. If you find for the Plaintiff but that the Plaintiff has failed to prove damages as defined in these instructions, you must award nominal damages. Nominal Damages may not exceed one dollar.

CITE: Section 11.6 9th Circuit Manual of Modern Jury Instruction (2001)

_____ Given as Requested
_____ Given as Modified
_____ Refused
~ _____ Withdrawn

Over objection of:
_____ Plaintiff
_____ Defendants

Plaintiff's Proposed Jury Instruction No. 12

If you find for the plaintiff, you may, but are not required to, award punitive damages. The purposes of punitive damages are to punish a defendant and to deter a defendant and others from committing similar acts in the future.

The plaintiff has the burden of proving that punitive damages should be awarded, by a preponderance of the evidence. You may award punitive damages only if you find that defendant's conduct was malicious, or in reckless disregard of plaintiff's rights. Conduct is malicious if it is accompanied by ill will, or spite, or if it is for the purpose of injuring another. Conduct is in reckless disregard of plaintiff's rights if, under the circumstances, it reflects complete indifference to the safety and /or rights of others.

If you find that punitive damages are appropriate, you must use reason in setting the amount. Punitive damages, if any, should be in an amount sufficient to fulfill their purposes but should not reflect bias, prejudice or sympathy toward any party. In considering punitive damages, you may consider the degree of reprehensibility of the defendant's conduct and the relationship of any award of punitive damages to any actual harm inflicted on the plaintiff.

CITE: Section.7.5 9th Circuit Manual of Modern Jury Instruction (2001)
(modified)

_____ Given as Requested
_____ Given as Modified
_____ Refused
- _____ Withdrawn

Over objection of:

_____ Plaintiff
_____ Defendants

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